



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marine Industries, Ltd.

File: B-225722

Date: May 21, 1987

DIGEST

Military contracting agency properly included, in solicitation for a barge, domestic shipyard restriction of 10 U.S.C. § 7309, since restriction applies to the procurement of any vessel by a military department.

DECISION

Marine Industries, Ltd. (MIL), a Canadian shipyard, protests the inclusion of a domestic shipyard restriction in invitation for bids (IFB) No. DACW61-87-B-0014, issued by the United States Army Corps of Engineers for construction of a service barge. The Corps will use the barge (a nonpropelled vessel containing a machine shop and an electrical power plant) for maintenance and repair of locks and dams, and for emergency salvage and recovery operations. The Corps incorporated the restriction into the IFB to comply with 10 U.S.C. § 7309 (Supp. III 1985) which reads, in part:

"(a) Except as provided in subsection (b), no naval vessel, and no vessel of any other military department . . . may be constructed in a foreign shipyard.

"(b) The President may authorize exceptions to the prohibition in subsection (a) when he determines that it is in the national security interest of the United States to do so. . . ."

Since MIL is a Canadian shipyard, this provision precludes it from competing for the award. MIL contends that the Corps lacks authority to impose the restriction because the cited statute either does not apply, or the restriction has been waived for this procurement. We deny the protest.

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Does the Restriction Apply to
the Current Procurement?

MIL's argument that the restriction does not apply is based on the restriction being included in Title 10 of the United States Code, which applies to the Armed Forces and which, MIL asserts, covers only military functions of the Corps. Since the procurement is for a civil works vessel and is financed by a Title 33 (Navigation and Navigable Waters) civil works revolving fund, 33 U.S.C. § 576 (1982), MIL concludes that the procurement does not encompass a Title 10 military function, and therefore is not subject to the restriction. MIL maintains that limiting the restriction in this manner is consistent with Congress' reason for enacting the restriction in 1982: to maintain American shipbuilding capability and know-how in case of war or national emergency. MIL argues that the military considerations (*i.e.*, the capability to build warships) found in the legislative history do not concern a civil vessel, and that it thus is improper to apply the restriction to other than Title 10 military functions funded by Department of Defense (DOD) appropriation acts.

We find no merit in MIL's position. On its face, the -
statutory restriction does not distinguish between vessels based on their intended military or civilian use or the source of the funds used to procure them but, rather, applies to all vessels of all military departments. Because the barge here is considered a vessel, and the Corps of Engineers is part of a military department (Army), we read the plain terms of the restriction as applying to this procurement.

The legislative history of the restriction supports our interpretation. Although the restriction, as initially codified in 1982, applied only to the Navy, it was expanded in 1984 to apply to all military departments by Section 8095 of Title VIII of the 1985 DOD Appropriations Act, enacted as part of Pub. L. No. 98-473, § 101(h), 98 Stat. 1837, 1941 (1984) (hereafter, 1984 amendment). The original provision and the 1984 amendment both were prompted by congressional concern that a dwindling domestic shipbuilding capacity would have a serious negative impact on the nation's ability to respond to national emergencies. The scope of the restriction was expanded to preclude the other military departments from purchasing foreign vessels and thus better

serve the original intent of the restriction, which the House Committee on Appropriations characterized as an effort to preserve adequate domestic shipbuilding capacity by barring DOD procurement of ships from foreign shipyards. See H.R. Rep. No. 98-1086, 98th Cong., 2d Sess. 290.1/ There is no indication that Congress intended to address the problem by limiting the restriction to vessels procured for military use and, given our reading of the statute itself, we find no basis for assuming that Congress had such an intent.

The fact that the barge will be procured with funds from the Corps' civil works revolving fund rather than from the Corps' military support appropriation does not change our conclusion. No matter which funds the Corps uses to procure a vessel, it remains that the Corps is a military department whose vessels are subject to the restriction. By the terms of the revolving fund statute, moreover, the functions for which the fund is available include "the furnishing of facilities and services for military functions of the Department of the Army." 33 U.S.C. § 576. Thus, we do not agree that purchases out of the fund are exempt from the subject restriction otherwise applicable to the Corps.

Has the Restriction Been
Waived for Canadian Firms?

As an alternative argument, MIL contends that the President effectively waived the restriction, as it applies to Canadian firms, under Executive Order No. 12,260, 46 Fed. Reg. 1653 (1981), reprinted in 19 U.S.C. § 2511 app. at 1027 (1982). The Executive Order states that the Secretary of Defense is authorized to waive certain trade prohibitions and restriction. According to MIL, the Secretary, using the authority in the Executive Order, has issued regulations removing domestic procurement restrictions otherwise applicable to Canada. We find this argument to be without merit. The cited Executive Order states that it only applies to procurements of eligible

1/ See also, Hearings on Department of Defense Appropriations for 1985 Before the Subcomm. on the Department of Defense of the House Comm. on Appropriations, 98th Cong., 2d Sess. (Part 7) 45-58 (1984) (dwindling shipyard capacity and its effect on the nation's sealift capability during national emergencies).

products by specifically listed executive agencies.
Although the DOD is listed, the Corps of Engineers is
expressly excluded from the list.

The protest is denied.

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel